

Follow the **Blood**: Toxicology Law and Advocacy

(and some odds and ends)

UPC Fall Conference
Sep. 16 – 18, 2015



Draeger DrugTest® 5000 – Oral Fluid
Drug Detection



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Drug Detection

Amphetamines

Benzodiazepines

Delta-9-tetrahydrocannabinol (THC)

Cocaine

Methamphetamine

Opiates

Methadone

Getting the blood and

Missouri v. McNeely, 132 S.Ct. 832 (2013), in Utah.



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Missouri v. McNeely, 132 S.Ct. 832 (2013).

“[S]ome circumstances will make obtaining a warrant impractical
[so] the dissipation of alcohol...will support an exigency
justifying a properly conducted warrantless blood test [sic].”

Blood draw and accessioning videos



Play blood draw video

"The alcohol on the sterile swab contaminated my client's blood sample."

Law enforcement uses iodine to sterilize needle insertion site.

Hospitals use isopropyl alcohol ("rubbing alcohol") to sterilize needle insertion site.

People drink ethyl alcohol, which is what the toxicology lab tests for.

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Evidence handling and packaging

Claims of mixed up vials or other mishandling

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Contamination defense (vacuum) / vacuum may expire

Invert tubes anti-coagulant / preservative does not expire

Blood test draw done with expired blood draw kit?

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Play evidence lifecycle at toxicology lab video

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"One at a time."

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On the jump drive

Blood draw video

blood draw kit

evidence lifecycle video (when available)

as demonstrative exhibits at trial.

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(L-SID) Label, Seal, Initial, Date

1. Label with:
 - Subject's Name (First and Last)
 - Your agency case number
2. Seal the tubes.
3. Initial and date seals.

Complete additional label information as required by your agency.

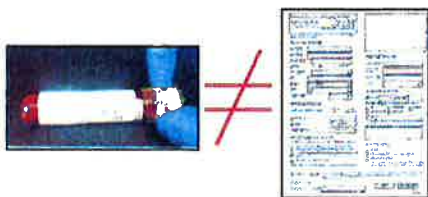
Packaging

1. Seal, initial, date the plastic container, if applicable.
2. Complete the Toxicology Request Form.
3. Seal, initial, and date the shipping box/envelope.

Labels and Seals

- No/missing information on label
- No/Inadequate seal
- No initials/dates on seals
- Label illegible
- Tube content obstructed
- Plastic tubes

Discrepancies



- Sample information does not match Request Form information
- Missing Request form or missing information

Vendor Label Info



- Each vendor label has different fields
- Some labels do not have the minimum required information (i.e., subject name, agency case #).

Kits Arrive Separately



- If not taped together, blood and urine from the same subject arrive separately.
- They may be assigned different Lab Case numbers.
- One of the two will have missing documentation.

Leaks / Breaks



- Urine containers are not properly capped.
- Blood vials are not properly packaged to prevent breakage.

Tox Lab Contacts

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Evidence

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Who needs to testify in a blood draw DUI?

Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011) (held testing/certifying analyst must appear live at trial and be subject to cross examination).

Surrogate testimony violates 6th amendment right to cross examine.

Commonwealth v. Yohe, 79 A.3d 520 (Penn. 2013) (and numerous other decisions have held substitute toxicologist may testify under certain conditions).

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Lexi May / substitute toxicologist issue

Raw data output

?

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7 Re-Direct Questions to Survive a Measurement Uncertainty Attack

https://www.wmo.int/pages/prog/gcos/documents/gruanmanuals/UK_NPL/mgpg11.pdf

Section 4 of the article

or Google:

"A beginner's guide to uncertainty of measurement"

The author is Stephanie Bell

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Phlebotomist and chain of custody witnesses...

Deeds v. State, 27 So.3d 1135 (Miss. 2009) (no confrontation clause violation where state could not even identify blood draw nurse and nurse did not appear at trial) (post-Melendez-Diaz, pre-Bullcoming).

Toxicologist predicate questions on the jump drive

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Motion to quash subpoenas for witnesses
besides arresting officer and analyst
(motion on the jump drive)

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Getting the hospital blood test results
when defendant immobilized – after charges are filed

State v. Yount, 182 P.3d 405 (Utah App. 2008).

Accident case - D refused blood draw at hospital.

State subpoenaed blood draw which the hospital took to treat defendant.

But did not provide notice to defendant.

Held: due process violation and evidence suppressed.

Lessons: provide notice (notice letter on the jump drive).

Spice / bath salts – DUIs

State crime lab

State toxicology lab

NMS (in Pennsylvania)

www.nmslabs.com

Spice / bath salts decision – the game we’re in

State v. Heinrichs, 845 N.W.2d 450 (Iowa App. 2013).

Possession “synthetic equivalents” of cannabis

Defense claimed due process violation

Court affirmed

Utah Code § 58-37-4.2 (“synthetic equivalents”)

Advocacy – opening statement

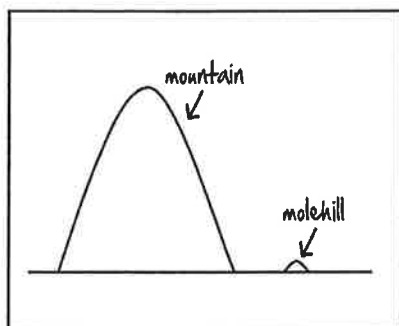
Save the intro

SFST’s in opening, *not* “the officer will tell you...”

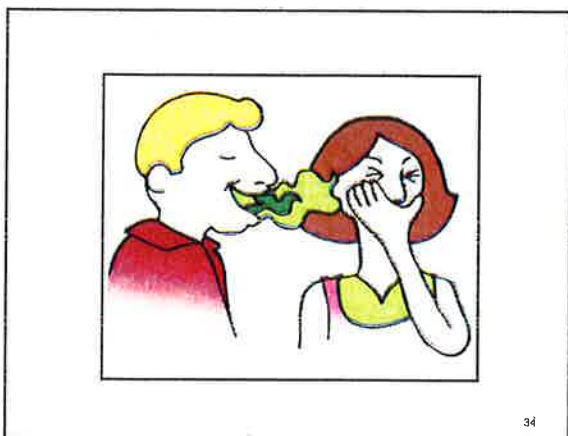
Case won in opening, direct, cross, closing, best haircut, best shoes, etc., who cares...

Read opening statement

Practice out loud before trial



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Extension of stop for DUI investigation

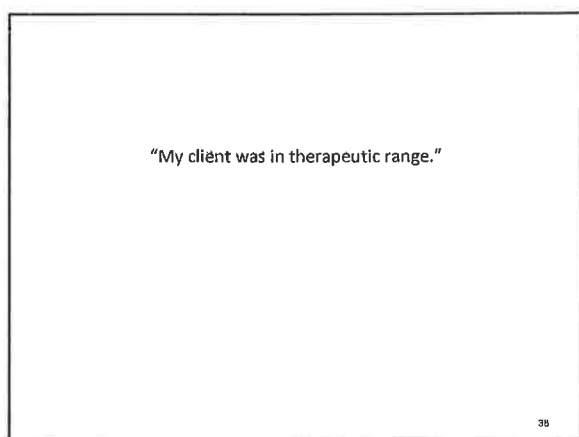
State v. Blissegger, 2003 UT App 256. "However, at this point [o]fficer...testified he smelled alcohol. This justified a continuation of the detention to conduct a field sobriety test."
 See also, *State v. Van Dyke*, 2009 UT App 369 (same); *State v. Morris*, 2011 UT 40, ¶30 (same).

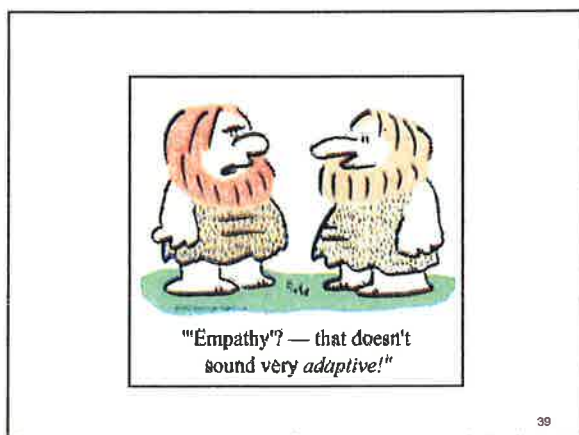
State v. Adamson, 2013 UT App 22 (detection of odor of alcohol on second officer-driver interaction sufficient to extend stop).

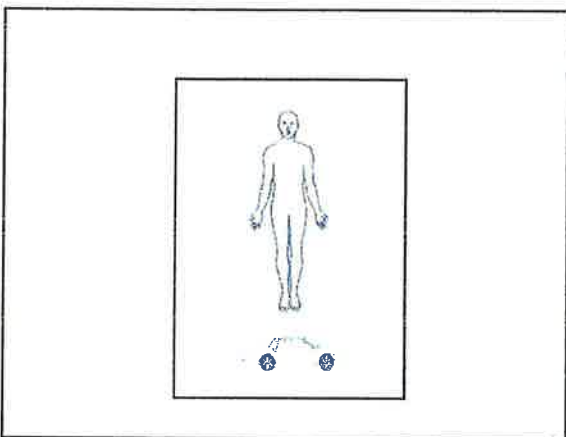


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Advocacy – DUI silhouette man

- driving pattern
- speech
- odor
- eyes
- skin
- SFSTs
- chemical test
- statements/admissions





NAPC DUI Defense Expert Project

Janine Arvizu

Tony Corroto

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Defense counsel use of DL hearing transcript in criminal DUI case

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Defense counsel use of DL hearing transcript in criminal DUI case

Taylor Electric Inc. v. Fox Construction, Inc., 2012 UT App 325 (“an official transcript – one prepared by a disinterested “official court transcriber” – may appropriately be considered by a court in making a summary judgment determination.”)

An official transcript will have been subject to cross-examination, which driver license hearings are not, at least in the sense that cross-examination happens in court.

Nor are driver license hearings “[judicially-supervised adversarial proceeding[s].”)

Motion In Limine on jump drive. Why not file it in every DUI case that gets set for trial?

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Administration of SFSTs – deviation from NHTSA manual

Johnson v. State, 1997 WL 256828, 1997 Ark. App. LEXIS 360 (Ark. App.) (unpub.) (held where officer imperfectly administers SFSTs the clue results are still admissible. The question is how much weight the court or jury should give them not admissibility). See also, *State v. Thomas*, 420 N.W.2d 747 (N.D. 1988) (same). Utah’s closest decision is *Rosengreen v. State Dept. of Public Safety*, 2003 UT App 183 (unpublished) (inferential support for substantial compliance is sufficient).

Administration of SFSTs – deviation from NHTSA manual

State v. Homan, 732 N.E.2d 952 (Ohio 2000) (stating minority view that the SFSTs must be administered in strict compliance with the NHTSA manual or they are inadmissible).

Ohio Rev. Stat. 4511.19(D)(4)(a), (b).

**IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY
TEST ELEMENTS IS CHANGED, THE VALIDITY IS
COMPROMISED.**

2006 NHTSA SFST Manual, Session VIII-19.

Salt Lake City v. Garcia, 912 P.2d 997 (Utah App. 1996).

In the trial court's words, Officer Warner could testify that he's
"observed a strong correlation between people who he has
concluded otherwise were under the influence of alcohol and
the presence of that, of those indicia. And you [defense
counsel] can do all the cross examination you want...."



OKN demonstration / use at trial (motion on the jump drive)

Police HGN video - Juab County (motion on the jump drive)

(video on the jump drive)

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HGN in other jurisdictions

U.S. v. Horn, 185 F.Supp.2d 530 (D. Maryland 2002) ([I]t cannot be disputed that there is a...causal connection between observable exaggerated horizontal gaze nystagmus in a suspect's eye and the ingestion of alcohol by that person."

"That being said, [there are] thirty-eight possible causes of nystagmus" not related to alcohol.



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Defense motion to dismiss at the close of the prosecution's case
 Is the evidence "so [] inconclusive or inherently improbable
 that reasonable minds must [have] reasonable doubt." *State v.*
Puerto, 2002 UT App 112 (unpublished).

Odor of alcohol throughout the stop and arrest

Slow and slurred speech throughout the stop and arrest

Flushed face and red bloodshot watery eyes

Every possible clue on HGN

The three clues the officer testified of on the walk and turn

The two clues the officer testified of on the one leg stand

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Rule 37, Utah R. Crim. P. (provide a copy to court and counsel
 when citing unpublished case in oral argument or staple copies
 to pleadings) (this rule is not on the jump drive).

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State v. Reyes, 2005 UT 33.

Double refusals

- Refusal to do SFSTs
- Refusal to submit to chemical test

"Firmly convinced" jury instruction.

"Firmly convinced" in closing argument

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Orem v. Longoria, 2008 UT App 168.

Jury instruction re refusal to submit to *field sobriety tests* is proper.

"[Y]ou may take notice of and give whatever weight you determine to the fact that [defendant] refused to perform any field sobriety tests."

Refusal to submit to chemical test is admissible

Sandy City v. Larson, 733 P.2d 137 (Utah 1987) (held defendant's refusal to submit to breath test is admissible and does not offend either rights against self-incrimination or due process).

State v. Hawley, 2001 UT App. 284 (unpublished) (court rejected argument that refusal to submit could only be admitted at subsequent criminal trial if there was full compliance with DUI statute including an administrative hearing where the hearing officer rules there was in fact a refusal to submit).

Closing argument – duty to convict

What else is on the jump drive?

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Subpoena UHP alcohol technician to every breath test DUI trial?

(motion on the jump drive)

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Defense counsel routinely subpoena UHP alcohol techs to trial

The whole point!

The [UHP] provides a technician to appear in court and to certify the breath test instrument use. In some instances these officers may explain the tests they perform on the instruments several times to the same judge on the same day. This bill requires the Commissioner of Public Safety to establish standards for administration and interpretation of breath test results. This bill...creates a presumption that the test result is valid without further foundation when done in a specified manner.

1979 Utah S. J. 43 Legis. Gen. Sess. No. 1, at 713-14.

19 NDAA monographs

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Utah DUI Prosecution Manual
(written by Brent Berkley)

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Stock/template DUI checkpoint application and order
("single purpose")

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DUI rolling case law update

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NHTSA 2013 manual

Reference re changes made

Section 8 separate

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Dopamine addicts

Cocaine brain / meth brain / bath salts brain

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The End

"Inside every defense attorney there's a
prosecutor screaming to get out."

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